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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 536

October Term, 1970

* * *

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

DAVID JESSIE GRAVES,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner
Box "R" Capitol Station
Austin, Texas 78711

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. ----------

October Term, 1970

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DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

v.

DAVID JESSIE GRAVES,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The State of Texas prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 3, 1970.

OPINION BELOW

The opinion delivered in the court below is reported at 424 F.2d 524 (1970) and is appended to this Petition as Appendix "A." The opinion of the United States District Court for the Eastern District of Texas is reported at 301 F.Supp. 264 (1969), and a copy thereof is appended hereto as Appendix "B." A Stay of Mandate was granted by the United States Court of Appeals to and including August 24, 1970.

JURISDICTION

As indicated above, the opinion of the United States

Court of Appeals was entered on April 3, 1970. (See Appendix "A.") A copy of the judgment is attached hereto as Appendix "C." The State of Texas thereafter, on April 14, 1970, filed a Petition for Rehearing with the suggestion that such petition be heard en banc, and said petition was denied May 26, 1970. (See Appendix "D.")

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a federal court should rest its grant of habeas corpus relief on a constitutional claim which was not raised by Graves at his state court trial, nor on a state appeal, the facts disclosing waiver of the constitutional point and a deliberate bypass of state remedies designed to correct trial errors?

2. Whether Graves's consent to a blood test was vitiated because the police chief informed him the blood would be used to determine the alcoholic content of his blood when the main purpose of the test was to determine Graves's blood type.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Texas Code of Criminal Procedure, Article 759(a), Section 2(b), now codified as Article 40.09(6)(c) (Vernon 1965), Volume 5, page 151, reads as follows:

> "(c) Formal exceptions to rulings on evidence, opinions or other actions of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling, opinion or action

of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to the ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Graves was arrested on the afternoon of June 8, 1963, and confined in Plano, Texas, on a charge of public drunkenness. Shortly before his arrest, an elderly woman had been raped in her home near Plano. Her description of her assailant to the Plano police closely resembled the man being held in the Plano jail on the drunkenness charge. Blood was found by investigating officers on the bed where the rape occurred.

Chief of police Toler testified that he made an investigation at the scene of the rape and obtained a description of the assailant. Dr. Eller joined him there, and after he and the doctor had been there for about fifteen minutes, he asked the doctor to go with him to the city jail. On the way back to town Chief Toler decided he would like to have a blood sample of the man confined in the jail.

The Chief testified that Graves first refused to give

a blood sample, but when he started to leave and told Graves he would make a case on him, Graves called him back and said he would give the blood. The police then had the blood tested for percentage of alcoholic content, and also typed Graves's blood.

At Graves's trial, the blood sample was introduced into evidence as being the same type blood as that of the rapist, and a chemist testified that 13.5% of the people in that area had that type of blood.

At Graves's trial, his two retained defense attorneys failed to point out to the state trial court that there was any question in regard to the legality of the search by which the blood sample was obtained. Their sole objection to the introduction of the blood type was that "it has not been tied up," and "the proper predicate has not been laid."

Graves was subsequently convicted on January 17, 1964, for rape, and was assessed by the jury as punishment, confinement for twelve (12) years in the State Penitentiary. He did not appeal.

Graves filed an application for writ of habeas corpus in the District Court of Collin County, Texas, and on September 12, 1968, a plenary hearing was held in that court. Subsequently the State District Judge entered findings of fact and conclusions of law adverse to Graves. This decision was affirmed by the Court of Criminal Appeals of Texas without written opinion.

Graves next filed an application for writ of habeas corpus in the United States District Court for the Eastern District of Texas, and on April 21, 1969, an evidentiary hearing was held in that Court. Subsequently the Court overturned the conviction, holding

that a blood sample taken from Graves was the result of an unlawful search in violation for the Fourth Amendment.

The United States Court of Appeals affirmed the holding of the district court below, and further held that even though Graves did not object to the introduction of the blood sample, and even though he did not appeal, he did not bypass state remedies since he raised his claims at a state habeas court hearing.

REASONS FOR GRANTING THE WRIT

A review on writ of certiorari should be granted where a court of appeals has rendered a decision in a way which conflicts with applicable decisions of this Court, and with the decisions of another court of appeals on the same matter. Further, a review should be granted where a court of appeals has decided an important question of state law in a way that conflicts with applicable state law. Supreme Court Rule 19.

Such is the situation here. The Fifth Circuit's holding in Graves that tainted evidence claims may be raised for the first time at a state habeas hearing vitiates the Texas rule requiring a contemporaneous, specific objection to the introduction of illegal evidence.

At Graves's trial, his two retained defense attorneys failed to point out to the state trial court that there was any question in regard to the legality of the search by which the blood sample was obtained. Their sole objection to the introduction of the blood type was that "it has not been tied up," and "the proper predicate has not been laid." (R. 142-144).

In *Henry v. Mississippi*, 379 U.S. 452 (1965), this Court said,

> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided."

At page 451 the Court discusses the fact that the defense may have failed to object on purpose hoping "to invite error and lay the foundation for a subsequent reversal." The Court then says if such a reason "motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here."

The strategy proscribed by the Court is exactly what has happened here, and will now happen time and time again if the Fifth Circuit's holding that specific objections need not be made at the time the allegedly tainted evidence is introduced is allowed to stand. There was no apparent reason why Graves's defense attorneys did not object to the introduction of the blood type at the state court trial on the ground it was taken by misrepresentation. The attorneys were aware of this fact, and there has been no change in the law on this point since Graves's trial in 1964.

Parker v. North Carolina, — U.S. —; 90 S.Ct. 1459 (1970), reaffirmed this Court's position in regard to a

defendant's failure to timely raise his objection. At page 1463 this Court said,

> "Because Parker had failed to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. See Fay v. Noia, 372 U.S. 391, 428-429 (1963). We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief."

The Fifth Circuit, however, has now held that defendants no longer need follow the Texas and Federal contemporaneous specific objection rule. The defense may now make an improper objection, or fail to make an objection, and then wait two, five, or ten years, permitting prosecution witnesses to die, and then collaterally attack the judgment with some claim that should have been made at the state court trial. The State of Texas submits that Pandora's box has been opened by this decision. As indicated, a defendant could forego a claim for strategic reasons by waiting until a state witness is no longer available, and then attack the conviction in a habeas proceeding.

The Fifth Circuit's holding in Graves also lays to rest the doctrine precluding federal court relief when there has been a deliberate bypass of state appellate procedure. The deliberate bypass rule allows a federal habeas court to avoid subverting a state's efforts to assure orderly criminal procedures by giving the court "a limited discretion" to refuse to hear a federal claim which, because of a purposeful procedural default by the applicant, has been forfeited in the state courts. Thus, the offender is punished for his default,

and others are deterred for similar defaults in the future.

There now appears to be no finality to state or federal criminal trials. Defendants under this holding no longer need concern themselves with preserving error and presenting it to the highest state court (or to federal appellate courts) in regular appeal proceedings. Habeas now appears to be a substitute for appeal, and defendants can attack their convictions by the habeas route for as long as they can think of claims to be raised.

It should be observed that Graves received a twelve year sentence for rape. Possibly, this sentence influenced the decision not to appeal. In any event, no appeal was taken and the State's Appellate Court had no opportunity to pass on and correct any trial court error. Thus, the State's correctional procedures were deliberately bypassed. *Fay v. Noia,* 372 U.S. 440 (1963), condemned such a bypass and the opinion below ignores the rationale of this holding. See also *Parker v. North Carolina,* supra.

The State of Texas does not know if Graves's defense counsel failed to object to the introduction of the blood type because of trial strategy, or negligence. However, The State of Texas strongly urges that the Fifth Circuit erred in holding that a defendant who fails to make a specific objection to the introduction of alleged tainted evidence, and who then fails to appeal, has nevertheless not bypassed state remedies because he does raise the alleged tainted evidence claim in a state court on habeas five years later. *Fay v. Noia,* supra, holds that a federal court may grant a petitioner

relief when it determines by holding a hearing, or by some other means that an applicant's default in bypassing state corrective process is not, under the circumstances, an intelligent and understanding waiver of his right to use the available state process. In this case, however, there are available no facts bearing upon Graves failure to specifically object, and upon his failure to appeal.

It could be that Graves felt he had the same grisly choice as *Noia*, and did not want to run the risk of receiving the death penalty on a subsequent retrial. The State of Texas could understand the court below holding that there was not bypass on this theory. But as noted, there are no facts in the record to support the "grisly choice" exception. The state urges that the Fifth Circuit's present opinion will make the orderly administration of criminal justice in both state and federal courts impossible.

2. *Graves's Consent To A Blood Test Was Not Vitiated Because The Police Chief Informed Him The Blood Would Be Used To Determine The Alcoholic Content Of His Blood When The Main Purpose Of The Test Was To Determine Graves's Blood Type.*

The chief of police testified he told Graves that he wanted to see how much alcohol Graves had in his system, and Graves first refused to give the blood sample. When the chief told Graves he would make a case on him and started to leave, Graves changed his mind and consented to letting a doctor draw the blood. A test was made to determine the percentage of alcohol in Graves's blood, and the blood was also typed. The Fifth Circuit held that Graves was misled as to the

purpose of the blood sample, and that his consent to the blood test was vitiated.

The State of Texas admits that there was misrepresentation in this case. The issue is whether the misrepresentation was such as to vitiate the consent. In *Frazier v. Cupp*, 394 U.S. 731 (1969), this Court had before it a case involving a flagrant misrepresentation by police officers. In that case Petitioner and his cousin had been convicted of murder. Petitioner was challenging the admission of his confession, and one of his grounds of attack was the fact that the police officer questioning Petitioner told him, falsely, that his cousin had been brought in and that he had confessed. In answer to this contention this court said, at page 739, "The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."

Surely the misrepresentation in *Frazier* is of much greater magnitude than the purported misrepresentation here. There is certainly more compulsion for a man to confess when he is told that his co-defendant has already confessed, than there is for a man to give a blood sample when he is not aware of all of the tests that may be run on the blood sample.

The Fifth Circuit held *Frazier* was not applicable to this situation because *Frazier* dealt with the voluntariness of a confession rather than the waiver of a right not to be searched. The court below seems to hold that Fourteenth Amendment rights are of a lesser status than Fourth Amendment rights, and that while misrepresentation will not vitiate an otherwise volun-

tary confession, it will vitiate consent that was given without coercion, duress, threats or promises.

The State of Texas submits that there is no hierarchy of constitutional rights, and that the court below erred in not applying the doctrine of *Frazier* to this case.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

DUNKLIN SULLIVAN
Assistant Attorney General

Attorneys for Petitioner
Box "R" Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Robert C. Flowers, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on counsel for the Petitioner by depositing same in the United States Mail, postage prepaid, addressed to Mr. Weldon Holcomb, 111-B N. Spring, Tyler, Texas 75701, this the ____ day of August, 1970.

ROBERT C. FLOWERS
Assistant Attorney General

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28502

DAVID JESSIE GRAVES,
Petitioner-Appellee,

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

---

(April 3, 1970)

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

WISDOM, Circuit Judge: In this case the Court scrutinizes the efficacy of a consent to a blood test secured by official strategem.

A Texas jury convicted David Jessie Graves of the offense of rape and assessed a punishment of twelve years imprisonment. As part of its evidence at trial the state proved that Graves's blood type matched that of blood discovered on the bed covers where the rape took place and differed from that of the prosecutrix. A chemist testified that only 13.5 percent of the people in the area had Graves's blood type (B). After

exhausting his state remedies, Graves filed an application for writ of habeas corpus in federal district court. The district court granted the writ, finding that state authorities had unconstitutionally obtained from Graves the blood sample that disclosed his blood type. We affirm.

Graves was arrested and confined in Plano, Texas, in 1963 on a charge of public drunkenness. Shortly after his arrest, the police received a report that an elderly woman had been raped in her home near Plano. Her description of her assailant closely fitted Graves. Since blood had been found on the bed covers, the Plano police chief requested Graves's permission to take a sample of his blood. Graves refused at first, but finally consented when he was informed that the sample would be used only to determine the alcoholic content of his blood. At the habeas corpus hearing, the following colloquy took place between the district judge and the police chief:

> Q. And was it your object to determine whether or not this blood sample that you were proposing to have taken be checked to see whether or not it corresponded with the blood type that was on the pillow case and on the bedspread?
>
> A. Yes, sir; I wanted to check it out.
>
> * * *
>
> Q. (continuing)—have you ever before or since had a blood test taken for a person who was charged with the offense of common drunkenness —common public drunkenness as distinguished from a D.W.I. charge—driving while intoxicated?
>
> A. No, sir; I have not.
>
> Q. Is that the only time that a test had ever been run in your—

A. (interrupting) First time in my career.

The district judge concluded that "the performance of the blood grouping test without a search warrant, and the subsequent use of the results of the test as evidence at the petitioner's trial, was illegal and in violation of his constitutional rights."

This case is not within the ambit of *Schmerber v. California*, 1966, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908. In *Schmerber*, the Supreme Court permitted the taking of a blood sample without a warrant and without consent because the officer there "might reasonably have believed that he was confronted with an emergency" in the destruction of the evidence—the reduction of the percentage of alcohol in the blood. Here, on the other hand, the police chief has admitted that his concern was to determine Graves's blood type. That quality is not evanescent: Graves's blood type would remain the same no matter how long it took to secure a warrant. In attempting to justify its warrantless search the state cannot avoid the emergency requirement of *Schmerber* by the consent it extracted from Graves. His consent, based on the police chief's representations, gave no more than the license that *Schmerber* provided without his consent.[1] To endow it with wider effect would allow the state to secure by stratagem what the fourth amendment requires a warrant to produce.[2]

---

[1] We do not say that a blood sample taken in good faith for a legitimate purpose—with consent or under the license of *Schmerber*—cannot upon new developments be used for another purpose not originally contemplated. That is not this case.

[2] Frazier v. Cupp, 1969, 394 U.S. 731, 89 S.Ct. 1420, 22 L. Ed.2d 684, requires no different result. *Frazier* involved the

The state contends that Graves deliberately bypassed orderly state procedures for raising his constitutional claim. It is true that at the state trial Graves's counsel objected to the introduction of his blood type not specifically on the grounds that it had been illegally secured, but because a proper predicate had not been laid. Graves did not appeal. But Graves did raise at his state habeas corpus hearing the issue he raises here. There the state district judge ruled against him and the Texas Court of Criminal Appeals affirmed. We conclude, therefore, that Graves did not deliberately bypass state remedies within the meaning of *Fay v. Noia*, 1963, 372 U.S. 391.

Since we are unable to say that the introduction of Graves's blood type was error harmless beyond a reasonable doubt, *Harrington v. California*, 1969, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284, we AFFIRM the judgment of the district court.

---

admissibility of a confession under pre-*Miranda* standards. When the defendant Frazier refused to confess, the interrogating officer told him falsely that his cousin and companion Rawls had already confessed his part. Although still reluctant to talk, Frazier ultimately confessed when the interrogator sympathetically suggested mitigating circumstances. The Supreme Court approached the question in terms of voluntariness. Employing a "totality of the circumstances" test, it concluded that the confession, which was otherwise voluntary, was not fatally tainted by the interrogator's misrepresentations. But in this case we do not void the consent as to the purpose for which it was given. In the presence of misrepresentation in its acquisition, we simply limit the state to the purposes represented.

If *Frazier* were applicable, and if we were considering the quality of the consent, we would note that *Frazier* dealt with the voluntariness of a confession rather than the waiver of a right not to be searched and that in *Frazier* there was a partial warning of constitutional rights whereas Graves received no warnings.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CIVIL ACTION NO. 4948

DAVID JESSIE GRAVES

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections

MEMORANDUM OPINION

Petitioner was convicted of the offense of rape in the District Court of Collin County, Texas, on January 17, 1964, and sentenced to twelve years' confinement in the Texas Department of Corrections. After exhausting all state remedies, petitioner filed an application for the writ of habeas corpus in this court, questioning the constitutionality of his arrest, of an identification lineup in which he was required to participate, and of the taking of a blood sample from him. At the hearing on this matter, petitioner abandoned the first two of his alleged grounds, and the sole remaining allegation in support of his application is, that the taking of a blood sample from him constituted an illegal search and seizure in violation of his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

On the afternoon of June 8, 1963, the petitioner was arrested and confined in Plano, Texas, on a charge of public drunkenness. Shortly before his arrest, an elderly deaf woman had been raped in her home near Plano. Her description of her assailant to the Plano police

closely resembled the appearance of petitioner. Blood was found by investigating officers on the bed where the rape occurred. After consulting with a physician who had examined the prosecutrix, the Plano Chief of Police made the decision to have a test performed, to determine petitioner's blood group.

The Chief of Police sought petitioner's voluntary consent to the taking of the blood test. At this time, the petitioner requested that he be permitted to consult with counsel, but this request was refused. The Chief of Police intimated to petitioner that the blood test was to be taken, in order to ascertain whether petitioner was intoxicated at the time of the test, that is, wheher petitioner had a sufficient quantity of alcohol in his blood stream to be detained on the charge of public drunkenness. Petitioner consented to the test on this basis. He was not informed that he was the prime suspect in the rape case, nor was he made aware that the blood test was primarily for the purpose of determining his blood group. At the hearing, the Chief of Police testified that he had never caused such a test to be performed in connection with a charge of public drunkenness, as distinguished from a charge of driving while intoxicated, on any prior or subsequent occasion.

The blood grouping test revealed that the petitioner's blood group, a rare type, was the same as that of the rapist. Since the blood group of the prosecutrix was of a common type, proof of the matching blood groups constituted significant evidence against the petitioner at his trial on the indictment for rape.*

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*Petitioner was never brought to trial on the charge of public drunkenness.

In *Schmerber v. State of California,* 384 U.S. 757, 770, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), the Supreme Court of the United States stated its views with respect to whether a search warrant is required to perform a blood test on an accused:

> "Search warrants are ordinarily required for searches of dwellings, and, *absent an emergency,* no less could be required where intrusions into the human body are concerned." [Italic added.]

No search warrant was obtained to authorize the blood test in question. The Chief of Police testified at the hearing, however, that such a warrant could have been obtained from the local Justice of the Peace, who was readily available. The court takes judicial notice of the fact that human blood groupings are genetic in their character and not subject to change; hence, there could have been no emergency in connection with the obtaining of the blood sample from petitioner.

Normally, petitioner's consent to the blood test would have constituted a waiver of his rights under the Fourth and Fourteenth Amendments. However, in *Cipres v. United States,* 343 F.2d 95, 97-98 (9th Cir. 1965), where the issue was whether the accused had waived her constitutional immunity from unreasonable search and seizure, it was held:

> "Waiver, in this context, means the 'intentional relinquishment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed 1461 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal

> election to grant officers a license which the person knows may be freely and effectively withheld."

In *Weed v. United States,* 340 F.2d 827, 829 (10th Cir. 1965), this same issue was presented in a situation where the petitioner was in custody at the time he gave his consent to the search and seizure. There, the court said:

> "Every reasonable presumption is against an accused's waiver of his constitutional rights, particularly when he is in custody, and the consent must be 'specific,' 'unequivocal,' and 'freely and intelligently given.' * * * Particular words of consent must always be weighed in light of the atmosphere and totality of circumstance in which they are spoken in order to determine the intent and voluntariness of the words."

Under the circumstances presented here—the petitioner in custody, without counsel, and his acquiescence to the blood test having been obtained by *suppressio veri*—it cannot be said that he intentionally relinquished a known right or that his consent to the test was freely and intelligently given. Therefore, this court holds that the petitioner's consent to the blood test was vitiated. See generally: *Bumper v. North Carolina,* 391 U.S. 543, 88 St.Ct. 1788, 20 L.Ed.2d 797 (1967); *U. S. v. Como,* 340 F.2d 891 (2d Cir. 1965); *United States v. Murphy,* 329 F.2d 68, 70 (2d Cir. 1964), *cert. denied,* 377 U.S. 967, 84 S.Ct. 1648, 12 L. Ed.2d 737 (1964); *Pekar v. U. S.,* 315 F.2d 319, 325 (5th Cir. 1963); *Gibson v. U. S.,* 149 F.2d 381 (D.C. Cir. 1945); *Bolger v. U. S.,* 189 F.Supp. 237, 253 (S.D. N.Y. 1960), aff'd *sub nom., Bolger v. Cleary,* 293 F.2d 368 (2d Cir. 1961), *rev'd on other grounds,* 371 U.S.

392, 83 S.Ct. 385, 9 L.Ed.2d 390 (1963); *U. S. v. Reckis,* 119 F.Supp. 687 (D. Mass. 1954).

It follows that the performance of the blood grouping test without a search warrant, and the subsequent use of the results of the test as evidence at petitioner's trial, was illegal and in violation of his constitutional rights. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1962); *Mapp v. State of Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Accordingly, an order will be entered granting petitioner's application for the writ of habeas corpus. However, the court will stay entry of the order for a period of thirty days, to enable the State of Texas to appeal or to initiate proceedings to retry petitioner. Counsel will prepare a proper order.

SIGNED and ENTERED this 30th day of June, 1969.

WM. WAYNE JUSTICE,
United States District Judge

APPENDIX "C"

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER, TERM 1969

No. 28502

D. C. Docket No. CA 4948

DAVID JESSIE GRAVES,

v. *Petitioner-Appellee,*

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

---

Before WISDOM, GOLDBERG, and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that the respondent-appellant pay to petitioner-appellee, the costs on appeal to be taxed by the Clerk of this Court.

April 3, 1970

Issued as Mandate:

APPENDIX "D"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 28502

DAVID JESSIE GRAVES,
Petitioner-Appellee,

v.

DR. GEORGE J. BETO, Director,
Texas Department of Corrections,
Respondent-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(May 26, 1970)

Before WISDOM, GOLDBERG and INGRAHAM, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

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Supreme Court, U.S.
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NOV 23 1970
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 536

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

DAVID JESSIE GRAVES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR DAVID JESSIE GRAVES IN OPPOSITION

WELDON HOLCOMB, ESQ.,
Counsel for Respondent,
111-B N. Spring,
Tyler, Texas 75701.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10843 — 1459 ROUND TABLE DRIVE — DALLAS — 631-3130

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Mize v. Crouse, 399 Fed. 2nd, 593 (Tenth Circuit 1968) 3

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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 536

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

DAVID JESSIE GRAVES,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MEMORANDUM FOR DAVID JESSIE GRAVES IN OPPOSITION

DAVID JESSIE GRAVES was tried and convicted in the State Courts for the State of Texas. He was and is confined in the Texas Department of Corrections as a result of such conviction. Habeas Corpus proceedings were filed in the State Courts. Adverse decision resulted in filing of Habeas Corpus proceedings in the Federal Court for the Eastern

District of Texas, Tyler Division, Honorable Wayne Justice presiding.

Counsel appointed for indigent petitioner by the Court. Proceedings on petition for Writ of Habeas Corpus heard April 21, 1969, in District Court of the United States for the Eastern District of Texas, Tyler Division. (App. pg 14) The District Court granted Petitioner's Writ by Memorandum Opinion reported at 301 F. Supp. 264 (1969) (Appendix "B" of Petition for Writ of Certiorari) The action of the District Court being affirmed in Opinion of Court of Appeals for the Fifth Circuit located at 424 Fed. 2nd, 524 (1970) and also Appendix "A" of Petition for Writ of Certiorari.

A stay of mandate was granted by the United States Court of Appeals to and including August 24, 1970, Application for Writ filed with the Supreme Court of the United States. The writer agrees with the result reached in the Opinions of the District Court as well as the Court of Appeals for the Fifth Circuit and feels strongly that the result is correct. However, Counsel also feels that the particular points involved in this cause are Constitutional stature and that for the clarification of the Constitutional aspects of the matter that the Honorable United States Supreme Court should grant the Petition for Certiorari filed by the Government because of possible conflict of interpretation between this cause and *Schmerber v. United States*, 86 Supreme Court 1826 (1960). In response to question number 1 presented in the Petition for Certiorari, the Respondent, DAVID JESSIE GRAVES, would respectfully show the Court

that the questions of waiver and deliberate bypass of state remedies as questioned by the Petitioner has always rested within the sound discretion of the Federal Habeas Judge as reflected in *Fay v. Noia*, 372 US 391, 83 Sup. Ct. 822, 9 L. Ed. 2nd 837 (1963). Thus it is apparent that both the District Court and the Court of Appeals for the Fifth Circuit utilized their discretion in favor of the Respondent, DAVID JESSIE GRAVES. In connection with this point also see *Mize v. Crouse*, 399 Fed. 2nd, 593 (Tenth Circuit 1968) and *Harris v. Beto*, 280 Fed. Supp. 532 (S.D. Texas 1967) Affirmed at 387 Fed. 2nd, 149 (Fifth Circuit 1967). In regard to the second point the Respondent would respectfully show that the results of the blood test was vitiated because the Police Chief informed the Respondent, DAVID JESSIE GRAVES, the blood would be used to determine the alcoholic content of his blood when the objective was to test the blood to determine the type and not the alcoholic content. In the words of the Fifth Circuit through Judge Wisdom "The Court scrutinizes the efficacy of a consent to a blood test secured by official strategem." To the writer this is a grave question of Constitutional stature and should be clarified by the United States Supreme Court especially in the view of numerous questions and interpretations placed upon the rights of Defendants under the rulings of the Court as reflected in *Schmerber v. United States* (cited above). In the Schmerber case the blood test was taken without the consent of the Defendant over his specific objections and over the specific objections of his Counsel, but the United States Supreme Court ruled that in that

particular situation and where the officer desires to take upon himself such action to prevent the disappearance of evidence "The interest in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search." No such emergency existed in the instant case. An individual blood type remains constant and does not change and although Counsel disagrees with the result of *Schmerber*, it is the law at the present time. In this case the Chief of Police frankly testified that he took the blood to be utilized as evidence in the rape case under investigation. That Chief of Police Toler himself knowingly, willfully and intentionally secured the blood test and sample by official strategem and consequently the Respondent could not on the other end of the question knowingly, voluntarily, intelligently and willingly waive his rights in regard to the blood test. (No warnings of any kind administered to the Defendant in custody prior to the taking of the blood sample.)

The Petition argues *Frazier v. Cupp*, 394 U.S. 731 (1969) as being controlling on this point. However, we refer this Honorable Court to the Opinion of the Fifth Circuit in this cause and the footnote number 2 of the Opinion as located in the Appendix "A" of Petitioner's Petition for Writ of Certiorari at pages 15 and 16 of said Appendix.

Therefore, Counsel approaches this response with mixed emotions, being completely in agreement with the result and the reasons therefor reached by both the District Court and the Court of Appeals for the Fifth Circuit in regard to his client, DAVID JESSIE GRAVES, Counsel still feels that the Writ of Certiorari filed herein by the State of Texas should be granted and that the Supreme Court of the United States settle the law for the Courts of the country on the points involved in this cause.

Respectfully submitted,

WELDON HOLCOMB
Attorney by Appointment
for David Jessie Graves
November, 1970

CERTIFICATE OF SERVICE

I, Weldon Holcomb, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Memorandum in Opposition on behalf of DAVID JESSIE GRAVES, Respondent in this cause No. 536 upon the Docket of the Supreme Court of the United States of America for the October Term, 1970, has been served on Counsel for Petitioner by depositing five copies of the same in the United States mail, postage prepaid, addressed to Mr. Robert C. Flowers, Assistant Attorney General of Texas, at his office address of Box "R", Capitol Station, Austin, Texas 78711, this the .... day of ....., 19 ..

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Weldon Holcomb
Attorney for Respondent